95-1449

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

CLARENCE DUDLEY AND GEORGIANNA DUDLEY,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, Second District of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the $8.25 million punitive damage award imposed in this case is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. *See BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting certiorari to consider excessiveness of punitive damage awards under Due Process Clause).

2. Whether the punitive damage award constitutes an excessive monetary punishment subject to constitutional review under the Excessive Fines Clause of the Eighth Amendment because the State of Florida has a statutory entitlement to 35% of all punitive damage awards in civil actions in which Florida substantive law applies.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.

Arabian Fiberglas Insulation Company

Asahi Fiber Glass Company, Ltd.

Fiberglas Colombia, S.A.

Polyplaster, S.A.

Scandinavian Glasfiber AB

Vitro-Fibras, S.A.

The parties to the appeal in the District Court of Appeal, Second District of Florida, in addition to those listed in the caption to this petition, included:

Public Medical Assistance Trust Fund of the State of Florida

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-615

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

CLARENCE DUDLEY AND
GEORGIANNA DUDLEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully petitions this Court for a writ of certiorari to review the judgment of the District Court of Appeal, Second District of Florida, entered in this case on December 8, 1995.

OPINIONS BELOW

The opinion of the District Court of Appeal [App. 1a] is unreported. The amended final judgment of the trial court, the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, State of Florida, Civil Division, is reprinted at App. 2a-3a.

JURISDICTION

The judgment of the District Court of Appeal was entered on December 8, 1995. On January 17, 1996, the District Court of Appeal denied OCF's motions seeking, *inter alia*, rehearing *en banc* and certification to the Florida Supreme Court [App. 4a]. This petition has been filed within 90 days of the District Court of Appeal's entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution Provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

Florida Statute § 768.73, the statutory provision governing the award and allocation of punitive damages in civil cases tried pursuant to Florida substantive law, is reproduced in its entirety at App. 120a-122a.

STATEMENT OF THE CASE

I. Factual Background

Beginning in 1943, Owens-Illinois, Inc. ("O-I") manufactured and sold an asbestos-containing insulation product called Kaylo. In 1953, OCF began selling Kaylo pursuant to a distribution agreement with O-I. In 1958, O-I sold its Kaylo manufacturing operations to OCF, and thereafter OCF manufactured and sold Kaylo. OCF began to manufacture asbestos-free Kaylo in 1972. [App. 42a-43a].[1]

More than 20 years later, OCF has received hundreds of thousands of claims from persons alleging injury from exposure to Kaylo. As of 1993, OCF had already resolved approximately 120,000 asbestos personal-injury claims and had taken a cumulative charge of $943 million against earnings to account for the estimated uninsured costs of asbestos claims through 1999. As of 1994, well over $70 million in punitive damages has been awarded against OCF in asbestos cases. [App. 75a-76a & n.13; 85a-88a & n.19].

Respondent Clarence Dudley worked as a sheet metal worker at a shipyard in Tampa, Florida during the early 1970s. [App. 39a]. While Mr. Dudley did not work directly with asbestos, asbestos-containing products were used during the 1970s in the engine and boiler rooms of tankers and cargo ships serviced at the shipyard. *Id.* Mr. Dudley was later diagnosed with mesothelioma, a cancer of

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1 Because neither the trial court nor the District Court of Appeal for the Second District of Florida issued a written opinion in this case, OCF has supported the statement of facts recited above with citations to the opening brief [App. 21a-98a] and reply brief [App. 99a-119a] OCF filed in with the District Court of Appeal in this matter.

the pleura (lung lining) believed to be caused by asbestos. [App. 41a].

II. Proceedings in the Trial Court

Mr. Dudley and his wife, respondent Georgianna Dudley, sued eleven former manufacturers of asbestos products for personal injuries allegedly arising out of a brief exposure to asbestos-containing products in or around 1972. [App. 37a]. The case went to trial against OCF as the sole defendant.

The trial court denied OCF's pre-trial motion to strike punitive damages on federal constitutional grounds and denied as well OCF's motion for directed verdict on the issue of punitive damages made at the close of evidence. [App. 36a-39a]. Even though OCF introduced evidence showing that OCF's Kaylo product complied with government and industry safety standards existing during the 1970s [App. 40a n.3; 93a-96a], the jury imposed $15 million in punitive damages against OCF in addition to $2.75 million in compensatory damages for Mr. Dudley's injuries and $1.51 million in compensatory damages for Georgianna Dudley's losses. [App. 39a].

OCF filed a post-trial motion seeking judgment notwithstanding the verdict, a new trial, or remittitur of the damages awarded by the jury. [App. 5a-11a]. OCF argued that the trial court "erred in failing to grant [OCF's] Motion to Strike Punitive Damages and Motion in Limine as to Punitive Damages, where it was apparent that no legal basis existed for the imposition of punitive damages and the imposition of any punitive damages would violate the United States Constitution." [App. 7a]. OCF also argued that the punitive damage award was "excessive under the Constitution of the United States" and that its "imposition [would] violate[] the Eighth Amendment and the Due

Process Clause of the Fourteenth Amendment." [App. 8a]. OCF further maintained that the punitive damage award was constitutionally excessive because "the record [did] not establish an intent to injure sufficient to sustain the verdict" and because "[a]ny award of punitive damages against [OCF] at this stage of the asbestos litigation [was] unnecessary." [App. 9a]. Finally, OCF argued that the trial court should reduce the punitive damage award because the punitive damages awarded were presumptively excessive under Florida Statute § 768.73(1)(a) because they exceeded three times the amount of compensatory damages awarded. [App. 8a].

The trial court remitted the punitive damage award to three times the compensatory damages of Clarence Dudley or $8.25 million dollars and rejected without explanation OCF's federal constitutional challenges to the punitive damage award. [App. 2a-3a].

III. Proceedings on Appeal

On appeal to the District Court of Appeal for the Second District of Florida, OCF contended, inter alia, that the award of punitive damages was unconstitutionally excessive in violation of the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. [App. 83a-96a, App. 111a-117a]. OCF argued that the award was unconstitutionally excessive in view of the multiple and widely varying punitive awards already imposed (and likely to be imposed) on OCF in other cases. [App. 84a-91a]. OCF also argued that the award violated its federal due process rights because, *inter alia*, the evidence showed that OCF's product satisfied applicable industry and government safety standards. [App. 40a n.3; 93a-96a]. Indeed, the trial evidence indicated that the dust raised by the ordinary cutting and

handling of Kaylo did not exceed threshold standards which had been "recommended by the American Conference of Governmental Industrial Hygienists and adopted by most jurisdictions, including Florida, New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located)." [App. 94a-95a]. Moreover, as OCF noted in its brief on appeal, the evidence at trial that OCF complied with OSHA warning-label requirements even before those requirements went into effect was uncontroverted. [App. 40a n.3; 94a-95a].

In addition, OCF argued that the punitive damage award constituted a monetary punishment subject to constitutional limitation under the Excessive Fines Clause of the Eighth Amendment because the State of Florida has a statutory entitlement to 35% of punitive damages awarded in civil actions tried pursuant to Florida substantive law. [App. 59a-80a]. OCF argued that the punitive damage award violated the Excessive Fines Clause because the award was disproportionate to any wrong committed by OCF. [App. 73a-78a]. Further, OCF argued to the District Court of Appeal that the Excessive Fines Clause at a minimum prohibits repetitive monetary punishments for a single course of conduct that threaten to eventually deprive a corporate defendant such as OCF of the ability to conduct its business. [App. 79a-82a].

The District Court of Appeal for the Second District of Florida affirmed the judgment of the trial court in a one-word per curiam opinion. [App. 1a].

OCF timely filed three motions following the District Court of Appeal's summary affirmance of the judgment against OCF: (1) a motion for rehearing en banc [App. 12a-14a]; (2) a motion seeking clarification of the basis of the court's decision and certification to the Florida Supreme Court arguing, inter alia, that the punitive damage award was excessive in violation of the Due Process Clause of the

Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment [App. 15a-18a]; and (3) a motion to stay the issuance of mandate during the pendency of all review proceedings in Florida courts or, in the alternative, a request to stay the issuance of mandate for a period of 60 days to allow OCF to seek a stay of execution from this Court conditioned on the filing of a Petition for Writ of Certiorari [App. 19a-20a]. The Florida Court of Appeal denied all of OCF's motions by order dated January 17, 1996. [App. 4a].

On January 24, 1996, OCF filed an application to stay execution of the judgment with Justice Kennedy, who granted a temporary stay on January 24, 1996, pending receipt of a response to OCF's stay application. Following receipt of a response, Justice Kennedy granted a stay of the judgment on February 15, 1996. *See Owens-Corning Fiberglas Corp. v. Dudley*, No. A-615.

THE JUDGMENT BELOW FINALLY RESOLVES THE FEDERAL QUESTION PRESENTED IN THIS PETITION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a).

This petition presents the question whether the $8.25 million punitive damage award imposed on OCF is grossly excessive in violation of the Excessive Fines Clause and the Due Process Clause. As described above, those federal constitutional questions were presented to, and implicitly decided by, the District Court of Appeal. [App. 1a]. OCF also sought certification of its federal constitutional claims

to the Florida Supreme Court, but the District Court of Appeal denied OCF's motion. [App. 4a]. Because certification by the District Court of Appeal would have provided the only basis for the Florida Supreme Court's assumption of jurisdiction over this case, it is clear that OCF is seeking review of a decision "rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a). As all disputed issues were resolved by the District Court of Appeal, the judgment below is unquestionably final for purposes of this Court's certiorari jurisdiction. *See generally* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 3.3 (7th ed. 1993).

REASONS FOR GRANTING THE WRIT

I. The $8.25 Million Award Of Punitive Damages Is Grossly Excessive In Violation Of The Due Process Clause And The Factors Presented In The *BMW* Case

As this Court has recognized, "the Constitution imposes a substantive limit on the size of punitive damage awards." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994). In *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this Court granted certiorari to decide, *inter alia*, what standards are to be applied in determining whether a punitive damage award is unconstitutionally excessive. *See* Pet. for Cert. in No. 94-896 ("*BMW* Pet.") at I (raising question whether the challenged punitive award "is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment"). BMW's petition for a writ of certiorari pointed to various factors

that demonstrate the excessiveness of the award in that case, *see BMW* Pet. 18-25, many of which are present in this case as well

A. The Issues Presented In This Case Are Strikingly Similar To Those Presented In *BMW*

In this case, OCF has consistently argued that the punitive damage award violates the substantive component of the Due Process Clause. *See supra* pp.-8. Moreover, many of the precise factors that demonstrate the excessiveness of the award in *BMW* are also present here, making this case a particularly strong candidate for review. For example, BMW argues in its brief on the merits that its compliance with statutory disclosure standards adopted in numerous States eliminates any justification for a large award of punitive damages. *BMW* Pet. Br. 37-40 & n.23. Similarly, BMW argues that "adherence to industry custom . . . constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one of enormous size." *BMW* Pet. Br. 40-41; *see BMW* Pet. 18-19.

In this case, OCF likewise argues that the award violates its federal due process rights because the evidence showed that OCF's product complied with the standards "recommended by the American Conference of Governmental Industrial Hygienists and adopted by most jurisdictions, including Florida, New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located)." [App. 94a-95a]. Moreover, OCF complied with OSHA warning-label requirements even before those requirements went into effect. [App. 40a n.3; 94a-95a]. Thus, essentially the same factors relied upon by BMW are at issue in this case as well.

In addition, BMW argues at length that the punitive award is unconstitutionally excessive in part because the *BMW* case involves a "mass tort" and therefore creates the potential for multiple punitive awards arising out of the same course of conduct. *BMW* Pet. Br. 45-50. As BMW asserts, "[t]he question to be asked is: if every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?" *Id.* at 46; *see also BMW* Pet. 21.

Once again, precisely the same factor is present in this case. OCF has consistently argued that the excessiveness of the punitive damages award imposed in this case is demonstrated by the existence of, and potential for, numerous other claims of injury and punitive awards arising out of the same course of conduct, *i.e.*, OCF's manufacture and distribution of asbestos-containing Kaylo. [App. 79a-94a; App. 111a-116a]. Just as in *BMW*, moreover, the $8.5 punitive damage award at issue in this case would plainly be excessive "if every other plaintiff recovered the same amount of punitive damages." *BMW* Pet. Br. 46.

In short, this case raises the same question as that presented in *BMW*, and it does so in a very similar legal and factual setting that is even more compelling than *BMW*. Given the obvious and substantial similarities between the two cases, it is readily apparent that a favorable decision in *BMW* would have a direct and substantial impact on the outcome of this case. Indeed, OCF's application for a stay of execution was predicated in part on the substantial similarities between this case and *BMW*, and the Court (Kennedy, J.) found a sufficient probability of success to justify issuance of a stay. That determination amply supports OCF's contention that, at the very least, the question presented in this petition is likely to be affected by the resolution of the *BMW* case. Accordingly, at a minimum this petition should be held pending the Court's

decision in *BMW* and then disposed of in light of the disposition of that case.

B. The Lower State And Federal Courts Are Divided Over The Standards To Be Applied In Reviewing Punitive Damage Awards

The *BMW* petition argues persuasively that, despite this Court's prior decisions in this area,[2] punitive damage awards continue to skyrocket and the lower state and federal courts continue to apply inconsistent standards and reach conflicting results in reviewing the size of punitive damage verdicts. *BMW* Pet. 26-29. Thus, the *BMW* petition demonstrates that the lower federal and state courts are in substantial need of additional guidance on the proper approach to the excessiveness inquiry. This Court's decision to grant review in *BMW* establishes the importance and significance of that question. Review of that same question would therefore be warranted in this case if the Court's disposition of *BMW* were to leave that question unresolved.

Indeed, this case is a particularly strong candidate for review in that regard, because the decision below is directly inconsistent with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993), which involved an asbestos personal injury suit against OCF arising out of the same course of conduct at issue here. In *Dunn*, the Court of Appeals held that the district court gave "insufficient consideration to the effect of successive punitive awards in asbestos litigation" when it remitted a $25 million award against OCF to $2 million. 1 F.3d at 1391. Accordingly, the en banc court

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2 *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

further reduced the award against OCF to $1 million, explaining that an award of that size was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added).[3]

Similarly, numerous other courts have emphasized that the existence of, or potential for, other punitive damage awards against the same defendant for the same course of conduct raises due process concerns and is an appropriate factor to be considered in determining whether a particular award is grossly excessive.[4] Although OCF argued this point at length to the District Court of Appeal [App. 79a-94a; 111a-116a], that court (unlike the Third Circuit in

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[3] Five members of the court dissented on the ground that the Due Process Clauses bars *any* further awards of punitive damages against OCF because the amounts already awarded in prior litigation are more than necessary to achieve fully the goals of punishment and deterrence. *Id.* at 1400-05 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.); *id.* at 1405 (Becker, J., dissenting).

[4] *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (citing with approval the Alabama Supreme Court's consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires consideration of "other civil or criminal penalties levied on the defendant"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852, *and cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967) (Friendly, J.); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234, 1236 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Dunn v. HOVIC) was unpersuaded. Plenary review of this issue is therefore warranted if this Court's disposition of *BMW* does not itself require reconsideration of the judgment in this case.

II. This Court Should Resolve The Important Question Whether The Excessive Fines Clause Imposes Limitations On Punitive Damage Awards Where The State Has A Right To Recover A Share Of The Damages Awarded

This case raises a specific question reserved by the Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989): whether the Excessive Fines Clause constrains the imposition of punitive damage awards in civil cases where the State shares in any such damages exacted. The Court's reservation of this question in *Browning-Ferris* establishes the importance and significance of the Excessive Fines Clause question presented in this petition.

In *Browning-Ferris*, the Court suggested that the Excessive Fines Clause places constitutional limitations on monetary punishments imposed in the form of civil punitive damages if the government is entitled to a share of the award. The Court determined that the Excessive Fines Clause does not "constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Browning-Ferris*, at 264. Recognizing that the State's interest and involvement in a punitive damage award presents a distinct constitutional question, the Court specifically reserved judgment on the issue whether the Excessive Fines Clause limits monetary punishments in the form of punitive damages either "directly imposed by" or "payable to" the government. *Id.* at 268.

This case squarely presents the issue reserved by the Court in *Browning-Ferris* because under Florida Statute § 768.73(2)(b), the State of Florida is entitled to 35% of any punitive damages awarded in a civil action in which Florida substantive law governs. Indeed, the structure of § 768.73 reflects the Florida legislature's judgment that the State's interest in a punitive damage award stands on equal footing with that of the injured plaintiff. First, the statute allocates the proceeds of a punitive damage award roughly equally between the State and the injured party, with the State receiving 35% of the award and the injured party receiving approximately 44% of the award (65% of the award less a reduction for standard attorneys' fees). Fla. Stat. Ann. §§ 768.73(2)(b) and (7) (West 1995). Second, if any part of a punitive damage award proves uncollectible, Fla. Stat. Ann. § 768.73(6) (West 1995) entitles the State and the injured party to a proportional share of the punitive damages actually collected. The Florida statutory scheme gives the State of Florida precisely the kind of interest and involvement in a punitive damage award that the *Browning-Ferris* Court suggested would trigger the application of the Excessive Fines Clause.

Moreover, this case is a particularly strong candidate for review because the Court recently rejected the proposition that the Excessive Fines Clause applies only to criminal proceedings. *Austin v. United States*, 113 S. Ct. 2801 (1993). *Austin* raised the issue whether the Government's ability to exact criminal punishment using the mechanism of *in rem* civil forfeiture proceedings implicated the Excessive Fines Clause of the Eighth Amendment. The Court ruled that the Excessive Fines Clause does contemplate limits on such monetary punishments and reasoned that the applicability of the Eighth Amendment does not turn on whether a particular proceeding is civil or criminal, but on whether the sanction imposed can be classified as "punishment." 113 S. Ct. at 2805-06.

Observing that the common "'notion of punishment. . . cuts across the division between the civil and the criminal law,'" the Court concluded that the "'Excessive Fines Clause limits the Government's power to extract payments'" whenever imposed as "'punishment for some offense.'" *Id.* at 2805 (quoting *United States v. Halper*, 490 U.S. 435, 447-448 (1989), and *Browning-Ferris*, 492 U.S. at 266-67). *Austin* stands for the proposition that any monetary punishment imposed by or payable to the government is subject to the limitations of the Excessive Fines Clause.

The Court's interpretation and application of the Excessive Fines Clause in *Austin* follows the course charted by the Court four years earlier in *Browning-Ferris* where, as explained above, the Court suggested that the Excessive Fines Clause places constitutional limitations on monetary punishments imposed in the form of civil punitive damages if the government is entitled to a share of the award.

The evolution of the Court's jurisprudence concerning the applicability of the Excessive Fines Clause to civil actions suggests that punitive damages assessed pursuant to § 768.73 are monetary punishments subject to constitutional limitation by the Excessive Fines Clause of the Eighth Amendment.[5]

The punitive damages awarded below are monetary punishments for at least two reasons previously articulated by this Court. First, as their name suggests and as historically understood, punitive damages serve the same

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5 The significance of this issue extends beyond civil cases in which punitive damages are assessed pursuant to Florida Statute § 768.73. Numerous states have adopted similar statutory provisions and now have, like Florida, a substantial stake in punitive damage awards rendered in private civil actions.

goals as criminal punishments. This Court has recognized that "punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Given the purpose of punitive damages, it is entirely appropriate to classify them as monetary punishments triggering a need for review under the Excessive Fines Clause.

Second, in the wake of this Court's decisions in *Browning-Ferris* and *Austin*, it is evident that the sphere of monetary punishments encompasses more than the notion of punitive fines or even forfeitures, but includes as well mandatory monetary payments payable to a sovereign that "can only be explained as serving in part to punish." *Austin*, 113 S. Ct. at 2805-06.

This case warrants review because the Excessive Fines Clause question presented in this case is an important and unsettled federal constitutional question that this Court has identified as constitutionally distinct from prior decisions of the Court involving the applicability of the Excessive Fines Clause to punitive damages awarded in civil actions. Moreover, the $8.25 million dollar award constitutes a monetary punishment that is excessive under any objective standard of that constitutional provision. In its consideration of the application of the Excessive Fines Clause in three cases over the past seven years, the Court has declined to establish any particular test for excessiveness, apparently deeming it prudent to "allow the lower courts to consider that question in the first instance." *Austin*, 113 S. Ct. at 2812 (citing *Yee v. City of Escondido*, 112 S. Ct. 1522, 1534 (1992)); *see also Alexander v. United States*, 113 S. Ct. 2766, 2776 (1993). Plenary review is required so that the Court can confirm that the

Excessive Fines Clause constrains the imposition of punitive damage awards in civil cases where the State shares in any such damages exacted. The Court should then remand this case to the state court to allow that court to consider in the first instance what particular test of excessiveness is constitutionally required.

CONCLUSION

The petition for a writ of certiorari should be either granted in full or held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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